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No. 914318

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1918.

MARK EISNER, AS COLLECTOR, ETC.,
Plaintiff-in-Error,

against

MYRTLE H. MACOMBER,
Defendant-in-Error.

MOTION TO ADVANCE.

CHARLES E. HUGHES,
GEORGE WELWOOD MURRAY,
Counsel for Defendant-in-Error.

MURRAY, PRENTICE & HOWLAND,
Attorneys for Defendant-in-Error.

The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

IN THE

Supreme Court of the United States,

October Term, A. D. 1918.

No. .

MARK EISNER, AS COLLECTOR, ETC.,
PLAINTIFF-IN-ERROR,

AGAINST

MYRTLE H. MACOMBER,
DEFENDANT-IN-ERROR.

MOTION TO ADVANCE.

NOW COMES MYRTLE H. MACOMBER, THE DEFENDANT-IN-ERROR, AND MOVES THE COURT THAT THIS CAUSE BE ADVANCED ON THE DOCKET AND SET DOWN FOR HEARING UPON A DAY CERTAIN.

STATEMENT OF FACTS.

The writ of error in this case is brought to review the final judgment of the United States District Court for the Southern District of New York entered upon an order overruling the Collector's demurrer to the com-

plaint. The action was brought by a taxpayer to recover a tax assessed under the Income Tax Law of 1916 on the ground that it was illegally assessed. The plaintiff paid the tax under protest and took an appeal in due time to the Commissioner of Internal Revenue.

No technical question of practice is involved; the sole question is whether or not the tax was wrongfully assessed and collected.

The tax in question amounted to $1,367.02 and was paid as income tax for the year 1916. The plaintiff had received certain stock from the Standard Oil Company of California and the receipt of this stock was the sole basis for the tax. The question presented by the writ of error is whether that stock, which has been designated a "stock dividend", constituted taxable income.

Briefly the complaint alleges the following facts:

On January 1, 1916, the Standard Oil Company of California had outstanding capital stock in the amount of $49,686,656. and had accumulated a large surplus which was invested in its plant, property and business. In 1916 the Board of Directors of the corporation, for the purpose of readjusting the capitalization of the company, decided to issue additional shares of stock in the proportion of one-half of a share for each share of stock then owned by each stockholder, and in accordance with the resolution of the directors there was transferred from surplus account to capital stock account the sum of $24,843,327.74, being the equivalent

of the par value of said stock dividend. Of this sum $20,353,068.34 was charged against and represented surplus of the company earned prior to March 1, 1913, and $4,490,259.40 was charged against and represented surplus earned after March 1, 1913. The plaintiff held 2,200 shares of stock and received 1,100 shares of the new stock, which to the extent of 18.0743% represented earnings of the company since March 1, 1913. The remaining 81.9257% is not in question in this case. The defendant, acting under instructions from the Treasury Department, contended that all the new stock so received by the plaintiff constituted taxable income and levied a tax thereon on the theory that this stock was legally equivalent to a cash dividend at the rate of $100. a share.

By the receipt of this new stock the plaintiff's share or interest in the assets of the Standard Oil Company of California was not changed but the transaction merely increased the number of shares or parts into which her interest was divided; the market value of the plaintiff's total number of shares remained substantially the same and unaffected by the new issue of shares; before the surplus was capitalized the stock was selling at the price of from $360. to $382. per share, and after it was capitalized by this increase of fifty per cent in the number of outstanding shares the market price was from $234. to $268. a share.

The complaint alleges that the stock did not constitute taxable income under the Income Tax Law of September 9, 1916, and that no tax was due on it, and

that the Act of Congress under which said sum of $1,367.02 was levied on said additional shares, representative of the Company's earnings since March 1, 1913, and its payment compelled,—to wit: Title I of the Act of September 9, 1916,—is invalid and void in so far as the same may be asserted to confer power to make such levy on said additional shares constituting said stock dividend or to compel such payment because in violation of the provisions of Article I, Section 2, clause 3 of the Constitution of the United States and not within the terms of the Sixteenth Amendment.

The District Court expressly passed upon the constitutional question, following the decision of this Court in *Towne against Eisner, Collector*, 245 U. S. 418, and also referred to *Peabody against Eisner*, 247 U. S. 347.

The special and peculiar circumstances involved in the case and requiring a speedy hearing of the cause are as follows:

The Income Tax Law of 1916, Title I (39 Stat. 756, Chap. 463) provides:

> In Section 1 (*b*): "In addition to the income tax imposed by subdivision (*a*) of this Section (herein referred to as the Normal Tax) there shall be levied, assessed, collected and paid upon the total net income of every individual or in the case of a non-resident alien the total net income from all sources within the United States, an additional income tax * * *".

In Section 2 (*a*):

> "The net income of the taxable person shall include gains, profits and income derived from salaries, wages or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trades, commerce or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in any real or personal property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever; *Provided*, that the term 'dividends' as used in this title shall be held to mean any distribution made or ordered to be made by a corporation, joint-stock company, association or insurance company out of its earnings or profits, accrued since March first, nineteen hundred and thirteen, and payable to its shareholders, whether in cash or in stock of the corporation, joint-stock company, association, or insurance company, which stock dividend shall be considered income, to the amount of its cash value."

The Collector, plaintiff-in-error, acting under instructions of the Treasury Department, required the defendant-in-error to pay the tax of $1,367.02 above mentioned, being that proportion of her total tax upon the stock in question representative of the company's earnings since March 1, 1913, upon the theory and claim that the stock above referred to was income.

Numerous other citizens have been required by the public authorities to make similar payments. The authorities are now requiring payment of many others and still others are under the threat of imminent notice from the authorities requiring immediate payment. The sums directly involved amount to a considerable number of million dollars and the payments required, if not justified by law, form a considerable oppression of the citizens in question.

The questions involved and to be presented to the Court for its determination are these:

The construction of the Constitution and the constitutionality of the portions of the Income Tax of 1916 just above quoted. The case at bar concerns a direct tax which must be apportioned unless "stock dividends" are income under the Sixteenth Amendment of the Constitution.

It is the contention of the defendant-in-error that a "stock dividend" is not income under a proper construction of the Sixteeenth Amendment; that a stock dividend is not income to the stockholder receiving it but is a mere readjustment of the form of a capital obligation already owned (*Gibbons* v. *Mahon*, 136 U. S. 549); and that the case is controlled by the ruling of this Court in *Towne against Eisner*, 245 U. S. 418, and *Peabody against Eisner*, 247 U. S. 347.

These questions, directly affecting the administration of the revenue, are of grave importance and we

conceive it to be in the public interest that this case should be advanced.

CHARLES E. HUGHES,
GEORGE WELWOOD MURRAY,
Counsel for Defendant-in-Error.

MURRAY, PRENTICE & HOWLAND,
Attorneys for Defendant-in-Error.

The Plaintiff-in-Error consents that the above entitled cause be advanced upon the docket and set down for hearing by the Court. and joins in the request for advancement

Alex. C. King
Solicitor General.